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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY LYNN BURGESS,

Defendant and Appellant.

G040670

(Super. Ct. No. 06CF2140)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert R. Fitzgerald, Judge. (Retired Judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

William Flenniken, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, James D. Dutton and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Jeffrey Lynn Burgess pled guilty to grand theft and receiving stolen property in exchange for the dismissal of one count of vandalism with a *Harvey*¹ waiver. The trial court sentenced Burgess to three years' formal probation. One of the conditions of probation was that Burgess agree to "[p]ay restitution in the amount to be determined" Following a restitution hearing, the trial court ordered Burgess to pay direct victim restitution in the amount of \$32,389.18. (Pen. Code, § 1202.4; all further statutory references are to the Penal Code unless otherwise stated.)

On appeal, Burgess contends the trial court violated his constitutional right to due process and a fair hearing by quashing a defense subpoena for the owner of the stolen and/or damaged property. He argues the court's order prevented him from subjecting the owner's valuation of the property to cross-examination under oath.

Generally, a "trial court violates the defendant's due process right at a hearing to determine the amount of restitution [when] the hearing procedures are fundamentally unfair. (*People v. Cain* (2000) 82 Cal.App.4th 81, 87 (*Cain*), citing *People v. Arbuckle* (1978) 22 Cal.3d 749, 754 (*Arbuckle*))." Burgess has failed to persuade us that the trial court's decision deprived him of a fair restitution hearing. Therefore, we affirm the judgment.

I

FACTS

According to the transcript of the preliminary hearing, Burgess rented a room in Lawrence Malone's Santa Ana home from August 2003 to May 2005. During this approximately two-year time period, Malone traveled extensively and was often away from home for long periods of time. In December 2004, he went to Australia for

¹ *People v. Harvey* (1979) 25 Cal.3d 754. As explained in *People v. Moser* (1996) 50 Cal.App.4th 130, "A *Harvey* waiver permits a trial court to consider facts underlying dismissed counts in determining the appropriate disposition for the offense of which the defendant was convicted." (*Id.* at p. 132-133.)

seven months. During his stay, Malone purchased seven surfboards with travel bags, leashes, and T-shirts for each board, and he paid to have these items shipped to his home.

When Malone returned home on May 5, 2005, however, he discovered that the surfboards were not in his home, and that several other items were missing from his house, including a 32-inch Sony television, a leather couch, an oversized chair, an end table, a desk chair, a modem and wireless router, a microwave oven, a down comforter and miscellaneous bed linens, and several lighting fixtures. In addition, someone had damaged two of his three Porsche automobiles, a red, 1989 Cabriolet and a white, 2001 Cabriolet, while both cars were parked in the garage.

On May 11, Malone prepared a document entitled, "STOLEN PROPERTY LIST," which listed 15 items that he alleged had been stolen or damaged during his absence. He estimated his total loss at \$12,945.

In May 2006, an Orange County Sheriff's Department deputy located three of Malone's surfboards in a San Clemente surfboard shop. The surfboards were offered for sale on consignment, and Burgess was listed as the owner of record. When the deputy contacted Burgess, he admitted stealing Malone's surfboards. He also confessed to taking Malone's couch and television, and an oversized chair and end table.

A felony complaint was filed in July 2006, alleging Burgess committed grand theft and vandalism "[o]n or about December 01, 2004," and that he received stolen property in May 2006. In March 2007, Malone filed a civil action to recover general damages of \$25,000 and punitive damages of \$100,000 as a result of Burgess's theft.

In September, after initially pleading not guilty and having a preliminary hearing, Burgess entered into a plea agreement. In exchange for pleading guilty to grand theft and vandalism, and admitting that he "willfully and unlawfully took personal property of another valued over \$400," the district attorney agreed to dismiss the vandalism charge and for the court to grant Burgess formal probation for three years. In

addition to a \$200 restitution fine, the court ordered Burgess to make restitution in an amount to be determined by the probation department.

Initially, Malone provided an updated stolen property list to the probation department that estimated the amount of his loss at \$24,512. This figure included the cost of estimated repairs on the two Porsche cars as well as shipping costs for the surfboards. In November 2007, the probation department reduced the figure to \$20,879.25, citing a lack of supporting evidence for proof of the loss as justification for the reduced figure. However, in March 2008, the probation department accepted the addition of \$7,924.93 to the restitution figure after Malone submitted a repair estimate for the 2001 Porsche. In the same month, Malone submitted a declaration in support of default judgment in his civil action, which claimed that the missing and damaged property was valued at \$26,898.25, an amount that included \$5,862 for stolen furniture and household furnishings. Ultimately, the probation department recommended ordering Burgess to pay \$28,804.18 in direct victim restitution.

The court conducted a restitution hearing in July 2008. The prosecutor submitted the probation department report and a collection of documents in support of Malone's restitution claim. Burgess submitted additional documentary evidence to highlight the discrepancies in Malone's valuation of damaged property, and he called Orange County Sheriff's Deputy Wayne Peters to testify to the condition of the surfboards when they were discovered for sale in San Clemente. Burgess also testified, telling the court that Malone's surfboards were in new to near-new condition when they were returned to Malone. He also claimed that he had not stolen all the items of furniture Malone listed on his stolen property list, and that he had returned the items he did take in "[d]ecent condition." However, the trial court quashed a defense subpoena for Malone's testimony, and released Malone without permitting Burgess to cross-examine him.

At the conclusion of the hearing, the prosecutor requested the court order Burgess to pay a total of \$32,389.18, which was a \$3,585 increase from what the

probation department had recommended. The prosecutor stated the difference represented “furniture which probation would not accept the victim’s estimate, but is currently before the court.” Burgess’s counsel argued that Malone had inflated the cost of repairs to the Porsches by adding in unrelated damage to the cars. Counsel also claimed that Malone should not receive the full value of the surfboards and furniture because these items had been returned to him in excellent condition. The court rejected Burgess’s contentions and awarded \$32,389.18 in direct victim restitution to Malone. Burgess filed a timely notice of appeal.

II

DISCUSSION

Although the court permitted Burgess to introduce evidence to contradict the values proffered by Malone, and to present the testimony of the law enforcement officer who recovered the surfboards, the court also quashed a defense subpoena for Malone’s testimony, thereby precluding any cross-examination about the discrepancies in Malone’s estimation of his loss. Malone, who was present in court at the beginning of the restitution hearing, was excused by the court over defense objection.

The following is defense counsel’s offer of proof with respect to Malone’s testimony: “Mr. Malone would testify that his statements to law enforcement in documents to the civil court in a corollary matter related to the same property as well as statements to probation throughout the last three years have changed to increase from a much less significant amount to the amount today; which Mr. Malone is requesting in restitution. [¶] I, also, anticipate that Mr. Malone would testify with regard to the specific items that he’s claiming that are the surfboards that they were, in fact, not in boxes when they were taken. And they were returned to him in an adequate condition. [¶] I’d, also, submit that the furniture that was taken was returned to him in adequate condition. [¶] And finally, I would expect that he would testify that he received an estimate from the car repair place that he submitted to probation. That includes items that go above and

beyond that which he specifically attributes damage to my client causing, for example, of the 2001 Porsche he claimed to the police that it was an engine deck lid. His estimate includes items that are not on the engine deck lid. And that's in documentation. And he would agree with that. [¶] He, also, would agree that the 1998 — I'm sorry — that was '98. [¶] The 2001 was the door dent. And he is requesting items to be repaired that go above and beyond that which he originally claimed was damaged by my client. [¶] And I understand the court's precluding me from calling him as a witness. That is my offer of proof. I'd request that he be called, otherwise, I'd preserve the issue for the hearing."

Burgess contends the trial court violated his constitutional right to due process by precluding him from proving an appropriate restitution amount by questioning Malone. Burgess complains that he "is now in the anomalous position of having a civil judgment against him in the amount of approximately \$26,898.25, and a restitution order, having the effect of a civil judgment in the amount of \$32,389.18." We conclude the court acted with its broad discretion to determine the amount of direct victim restitution in any given case.

Section 1202.4, subdivision (f)(1), provides, "[t]he defendant has the right to a hearing before a judge to dispute the determination of the amount [of restitution]." However, the trial judge is afforded great discretion in determining the amount of restitution to award. (*People v. Thygesen* (1999) 69 Cal.App.4th 988, 992.) Both the uncorroborated assertions of the crime victim and the recommendations of the probation officer constitute prima facie evidence of a restitution value. (*People v. Prosser* (2007) 157 Cal.App.4th 682, 684-685 (*Prosser*); see also *People v. Foster* (1993) 14 Cal.App.4th 939, 946.) "Once the victim has made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim." (*Prosser, supra*, 157 Cal.App.4th at pp. 684-685.) Furthermore, a restitution proceeding need not include the same procedural rules that apply to criminal cases generally. (*Cain, supra*, 82 Cal.App.4th at p. 87.) For instance,

the rules of evidence do not apply in the same manner, which means that hearsay is allowed to assist in the determination of restitution values. (*Ibid*; see also *Arbuckle, supra*, 22 Cal.3d at pp. 754-755.)

Moreover, at least one appellate court has specifically held that a criminal defendant does not have a Sixth Amendment right to confront and cross-examine witnesses at restitution hearings. (*Cain, supra*, 82 Cal.App.4th at p. 87.) Generally speaking, determining the amount of direct victim restitution is “part and parcel of the sentencing process.” (*Ibid.*) Consequently, “““sentencing judges are given virtually unlimited discretion as to the kind of information they can consider and the source from whence it comes.’ [Citation.]” [Citation.]” (*People v. Hove* (1999) 76 Cal.App.4th 1266, 1275.)

In *Cain*, following a plea of no contest to a charge of domestic violence, the defendant in a restitution hearing challenged the inclusion of counseling fees incurred by his wife. The court held that the defendant had sufficient information regarding the evidence in order to rebut the connection between the counseling sessions for his wife and his crime. In particular, the appellate court noted that the defendant could have introduced other evidence showing that the psychotherapy counseling was unrelated to his own criminal conduct. (*Cain, supra*, 82 Cal.App.4th at p. 87.) “For example, defendant could have called an expert to show that in light of the length of the counseling sessions and/or the time gap between the crime and the counseling, the counseling could not have been related only to the crime.” (*Ibid.*, fn. omitted.) The appellate court also suggested the possibility of the defendant introducing “evidence of the victim’s preexisting mental or psychological ailment” to bolster his claim. (*Ibid.*)

Here, as in *Cain*, the restitution hearing was fundamentally fair. Burgess testified on his own behalf and presented documentation and witness testimony that contradicted Malone’s claim, and there is no indication that court would have limited his attempts to introduce additional evidence or testimony to demonstrate that certain

claimed damage was sustained at different times or from different causes, or if repairs were made to undamaged sections of the vehicles. Burgess did testify, but he did not address the copy of the invoice from the car repair shop, which he could have testified did not match the damage that *he admitted* causing. Moreover, he could have introduced additional evidence of the market value of the returned surfboards, in their present condition, from the surfboard shop where he presented them for sale.

This case is distinguishable from certain aspects of *Prosser, supra*. There, the defendant challenged restitution valuations provided for stolen jewelry, complaining that the items had not been described with sufficient particularity. The victims testified at the restitution hearing. A different panel of this court mentioned, in dicta, that the defendant had simply missed the opportunity to cross-examine the victims in order to garner more detailed descriptions of the stolen jewelry. (*Prosser, supra*, 157 Cal.App.4th at p. 692.) However, we did not specifically state that the defendant *had the constitutional right* to cross-examine the victims to elicit that information in the first instance. (*Id.* at p. 691-692.)

In this case, Malone's loss was well documented with receipts, invoices, and photographs. Although Malone has periodically added more items to the list, i.e., additional furniture, leashes for the surfboards, or additional repairs to the cars, each added item was also supported by adequate documentation. With regard to the value of the furniture, Burgess does not appear to object to Malone's statement of value as much as the fact that the court included this amount in the overall figure, and that is a matter of trial court discretion.

The fundamental aspects of due process are the right to notice and the opportunity to be heard. (See *People v. Bautista* (1998) 63 Cal.App.4th 865, 870.) In proceedings to determine the amount of restitution to be ordered, "[a] defendant's due process rights are protected when the probation report gives notice of the amount of restitution claimed . . . and the defendant has an opportunity to challenge the figures in

the probation report’” (*People v. Resendez* (1993) 12 Cal.App.4th 98, 113.)

Burgess had sufficient information, including the probation report, car repair invoices, surfboard photographs, and his own knowledge, to challenge the proffered figures at the restitution hearing. In this case, the trial court simply rejected his evidence, choosing instead to rely on the probation officer’s report and the victim’s documentation.

“A trial court’s determination of the amount of restitution is reversible only if the appellant demonstrates a clear abuse of discretion. [Citation.] . . . In determining the amount of restitution, all that is required is that the trial court ‘use a rational method that could reasonably be said to make the victim whole, and may not make an order which is arbitrary or capricious.’ [Citations.] The order must be affirmed if there is a factual and rational basis for the amount.” (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1382.) Here, the court’s order is based on substantial evidence and there is no showing that it was arbitrary or capricious. (See *People v. Akins, supra*, 128 Cal.App.4th at p. 1382.) Although we agree with the *Prosser* court’s aside that the trial court’s discretion includes the option to permit cross-examination of a crime victim during a restitution hearing, we also conclude that the trial court’s decision here to do otherwise did not violate Burgess’s constitutional right to due process of law.

III
DISPOSITION

The judgment is affirmed.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

FYBEL, J.